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Saudah bt Ahmad v Mahatech Resources Sdn Bhd

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-37–01 OF 2015
AKHTAR TAHIR J
7 MARCH 2016

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Contract — Sale and purchase of land — Performance of promise — Agreement did not specify time when intending buyer would pay balance of deposit except that it would be paid when sale and purchase agreement signed — Whether balance of deposit should have been paid within reasonable time — Whether failure to pay balance deposit within reasonable time constituted breach entitling seller to terminate agreement — Whether seller to refund deposit monies paid by buyer as agreement did not say she could forfeit monies in event of breach — Whether seller not entitled to any damages for failure to prove she suffered any — Contracts Act 1950 s 47

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The plaintiff, who at the material time was more than 80 years old and allegedly could not read or hear and was visually impaired, had placed her thumb-print on a letter of offer of the defendant offering to buy the plaintiff's land for RM1m. The letter stated that the defendant would pay the plaintiff 1% of the purchase price as deposit by way of an initial payment of RM10,000 and the balance when the parties had executed a formal sale and purchase agreement. The plaintiff had also placed her thumb-print on a piece of paper which subsequently turned out to be a power of attorney ('PA') she had given the defendant to deal with the land. In the instant action, the plaintiff sought to declare both the PA and her 'agreement' with the defendant invalid and an order that the defendant pay her general, special, exemplary and punitive damages. The defendant contended that the plaintiff willingly signed both the letter of offer and the PA after a commissioner for oaths had explained the contents of the PA to her. The defendant also said it did not pay the balance of the deposit as the plaintiff failed to take positive steps to facilitate the sale of the land.

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Held, terminating the letter of offer and ordering the plaintiff to return the RM10,000 deposit to the defendant:

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(1) Under s 47 of the Contracts Act 1950, a contract had to be performed within a reasonable time. The defendant breached the terms of the letter of offer by failing within a reasonable time to pay the plaintiff the balance deposit as agreed, and to further sign a sale and purchase agreement. Due to that breach, the plaintiff was at liberty to terminate the agreement,

making it no longer enforceable and binding against both parties. The court ordered the letter of offer to be terminated. This, in turn, nullified the PA. Since there was no clause in the letter of offer giving the plaintiff the right to forfeit the deposit in the event of default, she had to return the RM10,000 deposit paid by the defendant (see paras 20–22).

(2) The plaintiff's claim for damages was not allowed as there were no facts to show she had suffered any damages from the defendant's default. In fact, the plaintiff's land had substantially appreciated in value (see para 23).

(3) The PA was valid. The court had no reason to disbelieve the testimony of the commissioner for oaths. It was also clear the PA was authenticated as specified under s 3 of the Powers of Attorney Act 1949. However, the powers contained in the PA could only be exercised on the completion of the sale of the land which, in turn, was dependent on the fulfilment of the terms of the letter of offer. It could not be denied that the main reason the parties failed to sign a proper sale and purchase agreement as per cl 3 of the letter of offer was the refusal of the defendant to pay the balance deposit of RM90,000 (see paras 11 & 14).

[Bahasa Malaysia summary

Plaintif, yang pada masa material umur lebih daripada 80 tahun dan didakwa tidak boleh membaca atau mendengar dan cacat penglihatan, telah meletakkan cap jarinya ke atas surat tawaran defendan yang menawarkan untuk membeli tanah plaintif bagi sejumlah RM1 juta. Surat menunjukkan bahawa defendan hanya akan membayar plaintif 1% daripada harga belian sebagai deposit melalui bayaran permulaan sejumlah RM10,000 dan baki apabila pihak-pihak telah melaksanakan perjanjian jual beli rasmi. Plaintif juga telah meletakkan cap jarinya ke atas sekeping kertas yang mana kemudiannya bertukar menjadi surat kuasa wakil ('SKW') yang dia berikan kepada defendan untuk berurusan dengan tanah tersebut. Dalam tindakan ini, plaintif memohon untuk mengisytiharkan kedua-dua SKW dan 'agreement' nya dengan defendan tak sah dan perintah bahawa defendan membayar kepadanya ganti rugi am, khas, teladan dan punitif. Defendan berhujah bahawa plaintif secara rela menandatangani kedua-dua surat tawaran dan SKW tersebut selepas pesuruhjaya sumpah telah menjelaskan mengenai kandungan SKW kepadanya. Defendan juga menyatakan ia tidak membayar bak deposit kerana plaintif gagal untuk mengambil langkah positif untuk memudahkan jualan tanah tersebut.

Diputuskan, menamatkan surat tawaran dan memerintah plaintif untuk memulangkan deposit RM10,000 kepada defendan:

(1) Di bawah s 47 Akta Kontrak 1950, kontrak mesti dilaksanakan dalam masa yang munasabah. Defendan melanggar terma-terma surat tawaran kerana gagal dalam masa yang munasabah untuk membayar kepada

plaintif baki deposit seperti yang dipersetujui, dan untuk menandatangani selanjutnya perjanjian jual beli. Akibat pelanggaran tersebut, plaintif bebas untuk menamatkan perjanjian tersebut, membuatkan ia tidak lagi boleh dikuatkuasakan dan mengikat kedua-dua pihak. Mahkamah memerintahkan surat tawaran ditamatkan. Ini dengan itu membatalkan SKW tersebut. Memandangkan tidak terdapat klausa dalam surat tawaran yang memberikan plaintif hak untuk merampas deposit sekiranya ingkar, plaintif mesti memulangkan kembali deposit RM10,000 yang dibayar oleh defendan (lihat perenggan 20–22).

(2) Tuntutan plaintif untuk ganti rugi tidak dibenarkan kerana tidak terdapat fakta untuk menunjukkan yang dia mengalami apa-apa kerugian daripada keingkaran defendan. Malahan, tanah plaintif secara substansial meningkat dalam nilai (lihat perenggan 23).

(3) SKW adalah sah. Mahkamah tidak mempunyai alasan untuk tidak mempercayai keterangan pesuruhjaya sumpah. Ia juga adalah jelas SKW telah disahkan seperti yang dinyatakan di bawah s 3 Akta Surat Kuasa Wakil 1949. Walau bagaimanapun, kuasa yang terdapat di dalam SKW hanya boleh dijalankan setelah selesainya jualan tanah yang mana, sebaliknya bergantung kepada penunaian terma-terma surat tawaran tersebut. Ia tidak dapat dinafikan bahawa alasan utama pihak-pihak gagal untuk menandatangani perjanjian jual beli yang betul seperti klausa 3 surat tawaran adalah keengganan defendan untuk membayar baki deposit sejumlah RM90,000 (lihat perenggan 11 & 14).]

Notes

For a case on performance of promise, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 6687.

Cases referred to

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

HA Securities Sdn Bhd v Ng Kong Yeam [1993] 3 MLJ 489, HC (refd)

Legislation referred to

Contracts Act 1950 s 47
Evidence Act 1950 s 118
Powers of Attorney Act 1949 s 3

Mohd Ibrahim bin Mohd (Ibrahim & Fuaadah) for the plaintiff.
Mohamad bin Ibrahim (Ganapathy with him) (Mohamad Ibrahim, Ganapathy & Assoc) for the defendant.

Akhtar Tahir J:

SALIENT FACTS OF THE CASE

[1] The plaintiff is the owner of a land held under Geran Mukim 1186, Lot 1742, Tempat Batu 12, Jalan Cheras, Daerah Hulu Langat, Negeri Selangor Darul Ehsan ('the said land').

[2] Through a letter of offer to purchase dated 2 May 2013 which the plaintiff had placed her thumb print, the defendant had made an offer to purchase the said land with the following conditions:

(a) land is sold with the offered price of RM1m;

(b) land sold without restrictions;

(c) deposit of 1% for the sum RM2,000 to be paid by cash and the balance of RM8,000 to be paid by cheque dated 13 May 2013 while balance of RM90,000 to be paid to the defendant's lawyer upon signing of the sale and purchase agreement.

[3] According to the plaintiff, she was further ordered to place her thumb print on a blank paper which was subsequently believed to be a power of attorney dated 7 May 2013. The plaintiff further contended that at the material time, she was over the age of 80 years, did not know how to read, could not hear and was visually impaired. The plaintiff therefore disputed the contents of the power of attorney.

[4] The defendant on the other hand alleged that the said offer letter together with the power of attorney were signed willingly without any interference and coercion on the part of the defendant and the defendant had exhausted all means in order to explained the content of the power of attorney to the plaintiff through a commissioner for oath.

[5] It was an undisputed fact in this case that the plaintiff had only received 1% from the total offered purchased price to the amount of RM10,000. The balance of RM990,000 was never received.

[6] As an explanation the defendant stated that he was reluctant to pay the balance sum as the plaintiff had not taken any steps towards acquiring the title deed or contacting the land office for purposes of transfer of land. In short the plaintiff sensed reluctance on the part of the defendant to complete the sale of the land.

[7] The plaintiff in her statement of claimed prayed for the following reliefs:

(a) a declaration that the power of attorney dated 7 May 2013 be held invalid;

(b) a declaration that any agreement between the plaintiff and the defendant be held null and void; and

(c) damages in forms of general, special, exemplary and punitive damages to be paid by the defendant to the plaintiff.

FINDINGS OF THE COURT

[8] Before the trial, the plaintiff in this case was brought before the deputy registrar for her deposition to be recorded. However a deposition could not be taken from the plaintiff and the reasons recorded by the deputy registrar for this failure was that the plaintiff was not able to understand and to answer any questions posed to her besides the fact that she was visually impaired and could not hear.

[9] I could not draw any adverse inference against the plaintiff for her failure to testify at the trial as the plaintiff was not a competent witness as provided under s 118 of the Evidence Act 1950 which states as follows:

> Who may testify
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> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

In the plaintiff's place her niece Halimah bt Saad ('SP1') who had some knowledge of the transaction between the plaintiff and the defendant, testified

[10] Moving on to the issue of the power of attorney which was thumb printed by the plaintiff the defendant's witness SD2, Letchumanan s/o Singaravellu, who was a commissioner of oath involved in preparing the said power of attorney was called to testify. According to his testimony, the plaintiff together with the director of the defendant, one Dato Nik Abdullah Hj Nik Muhamed ('SD1') had came to SD2's office, in which the power of attorney which was prepared in English was explained to the defendant in Bahasa Malaysia. The plaintiff had further nodded her head so as to signify that she understands the terms of the power of attorney and consented to it before placing her thumb print.

[11] I have no reason to disbelieve the testimony by SD2. It is further clear that the power of attorney is valid as it was authenticated as specified under s 3 of the Powers of Attorney Act 1949:

A (1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within Peninsular Malaysia unless —

(a) if executed within Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by —

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(i) a Magistrate;

(ii) a Justice of the Peace;

C (iii) a Land Administrator;

(iv) a Notary Public;

(v) a Commissioner for Oaths;

(vi) an advocate and solicitor; or

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(vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in Peninsular Malaysia and incorporated by or under any written law in force in Peninsular Malaysia

E (b)

(b) ...

(2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.

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G **[12]** Therefore I ruled that the power of attorney was valid. However despite ruling that the power of attorney was valid I am of the view that the powers contained in the power of attorney could be only exercised on the completion of the sale of the land. The completion of the sale of the land was in turn dependant on the fulfilment of the terms of the agreement dated 2 May 2013.

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[13] As has been emphasised earlier, it is agreed by both parties that up to this date, the only payment made by the defendant to the plaintiff was for the amount of RM10,000 as 1% deposit from the total amount payable. The reason for non-payment of RM90,000 as balanced deposit for the purchase of I the said land according to the defendant was because the defendant was not convinced that the plaintiff has taken all steps to proceed with selling of the said land, namely that the plaintiff has failed to procure the original document of title from the land office and that the plaintiff has failed to remove several caveats registered on the said land.

[14] Looking from the facts of the case and the testimony from parties before me, it could not be denied that the main reason on the failure of parties to sign a proper sale and purchase agreement as per cl 3 of the said letter of offer was the refusal of the defendant to pay the balance sum of RM90,000.

[15] In fact, according to the testimony from the director of the defendant SD1, there was an attempt to pay to the plaintiff a sum of RM50,000 on 5 August 2013 but was refused by the plaintiff.

[16] The plaintiff could not be faulted for the refusal to receive a lower sum than that was agreed upon. The refusal of the defendant to pay as agreed upon the agreement is clearly a breach of the agreement. The plaintiff is therefore permitted to terminate the agreement to sell the land.

[17] I further relied on s 47 of the Contracts Act 1950 of the which clearly provides that a contract is to be performed within a reasonable time.

> Time for performance of promise where no application is to be made and no time is specified
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> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

[18] This was further affirmed by a Federal Court case of *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464:

> Accordingly, it is our considered view that even if time was at large, there was still a duty on the plaintiff to commence work within a reasonable time. By failing to take the necessary steps to commence development for thirteen and a half years, the plaintiff has indeed breached the PDA which justified the issuance of the termination notice.

[19] While in another case of *HA Securities Sdn Bhd v Ng Kong Yeam* [1993] 3 MLJ 489, it was held that:

> Four months had elapsed since the failure of the rights issue, RM5m was at stake and shares were and are a volatile commodity. If no time for performance was specified, according to s 47 of the Contracts Act 1950, the engagement must be performed within a reasonable time

FINAL DECISION OF THE COURT

[20] Based on the above reasons, namely that the defendant has failed within a reasonable time to pay the plaintiff the balance deposit as agreed under the letter of offer, and to further sign a sale and purchase agreement, I find that the defendant has breached the terms of the letter of offer.

[21] Further, due to the said breach by the defendant, the plaintiff is now at liberty to terminate the agreement, making it no longer enforceable and binding against both parties. I therefore ordered that the letter of offer dated 2 May 2013 be terminated between the plaintiff and the defendant. This in turn nullified the power of attorney.

[22] Nonetheless, since there is no clause whatsoever in the letter of offer giving rights for the plaintiff to forfeit the 1% deposit paid by the defendant in the event of default, it is ordered that the deposit of RM10,000 be returned to the defendant.

[23] The claim by the plaintiff for damages nonetheless was not allowed as I could see no facts to show any damages suffered by the plaintiff from the default of the defendant. In fact going by the plaintiff's submissions, it was submitted that the value of the land up to this date has increased from RM1m to RM5m.

[24] Lastly, I ordered costs of RM25,000 be paid by the defendant to the plaintiff.

Letter of offer terminated and plaintiff ordered to return the RM10,000 deposit to defendant.

Reported by Ashok Kumar